

NOT FOR PUBLICATION

IN THE DISTRICT COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. THOMAS AND ST. JOHN

NICK POURZAL,)	
)	
Plaintiff,)	
)	
v.)	Civ. No. 2001-140
)	
MARRIOTT INTERNATIONAL, INC.,)	
CAPITAL HOTEL MANAGEMENT, LLC and)	
BLACKACRE CAPITAL MANAGEMENT, LLC,)	
)	
Defendants.)	
_____)	

MARRIOTT INTERNATIONAL, INC.,)
)
Defendant/)
Third-Party Plaintiff,)
)
v.)
)
Prime Hospitality Corp.,)
)
Third-Party Defendant.)
_____)

ATTORNEYS:

A. Jeffrey Weiss, Esq.

For the plaintiff, Nick Pourzal,

Marie E. Thomas-Griffith, Esq.

For the defendant and third-party plaintiff Marriott International, Inc.,

John Zebedee, Esq.

For the defendant Blackacre Capital Management,

Bennet Chan, Esq.

For the defendant Capital Hotel Management, LLC,

Maria Tankenson Hodge, Esq.

For the third-party defendant Prime Hospitality Corp.

MEMORANDUM OPINION

Before the Court are the motions of the defendants, Capital Hotel Management, LLC ("CHM") and Blackacre Capital Management, LLC. ("BCM"), to dismiss Counts V through VIII of the Revised Third Amended Complaint (the "Complaint") of the plaintiff, Nick Pourzal ("Pourzal") for failure to state a claim upon which relief can be granted.

I. FACTS

From 1985 to 1999, Prime owned and operated the Frenchman's Reef Beach Resort on St. Thomas (the "Reef").¹ During that time, Pourzal was employed as the General Manager and Chief Operating Officer of the Reef. The terms of Pourzal's employment were included in an employment agreement ("Employment Agreement"). The Reef also leased two apartment buildings, the properties known as the Band House and the Chef's House, a warehouse, a drug store, and a parking lot from Pourzal on a month-to-month basis.

In September, 1998, Prime and Marriott International ("Marriott") began negotiating the sale of the Reef. On August 8, 1999, Prime terminated Pourzal's employment. In an agreement

¹ A review of the facts of this case can be found in this Court's 2004 decision on this matter. See *Pourzal v. Marriott Int'l, Inc.*, 305 F. Supp. 2d 544 (D.V.I. 2004).

dated September 15, 1999 (the "Sale Agreement"), Prime agreed to sell the Reef to Marriott. The sale was finalized on March 15, 2000.

Marriott subsequently leased the Band House and the Chef's House properties from Pourzal. The Chef's House lease began on August 4, 2000, and terminated on August 4, 2001. The Band House lease began on August 27, 2001, and ran until August 27, 2002. The Band House lease included terms requiring Marriott to repair any damages resulting from its use of the Band House property. It also included a clause extending the lease for sixty-day periods after the original term expired unless and until one party submitted a notice of termination. No such clause was included in the Chef's House lease.

On August 7, 2001, Pourzal filed a complaint against Marriott. In a February 25, 2004, decision, this Court dismissed Pourzal's prima facie tort and civil conspiracy claims, and allowed him leave to re-file his complaint. *Pourzal v. Marriott Int'l, Inc.*, 305 F. Supp. 2d 544, 548 (D.V.I. 2004). Pourzal subsequently filed an amended complaint, which alleged tortious interference with contract, trespass, unjust enrichment, breach of contract, and intentional and negligent misrepresentation against Marriott. Pourzal also added CHM and BCM as defendants to the trespass, unjust enrichment, breach of contract, and

misrepresentation claims.² Pourzal alleges that CHM and BCM are the successor owners of the Reef, and have acquired property from Marriott.

CHM and BCM subsequently filed motions to dismiss Counts V-VIII of the Complaint pursuant to Federal Rule of Civil Procedure 12(b)(6).

II. DISCUSSION

When considering a Rule 12(b)(6) motion, all material allegations in the complaint are taken as admitted, and the Court must construe all facts in a light most favorable to the non-moving party. *Christopher v. Harbury*, 536 U.S. 403, 406 (2002). All reasonable inferences are drawn in favor of the non-moving party. *Alston v. Parker*, 363 F.3d 229, 223 (3d Cir. 2004). The complaint should not be dismissed unless the plaintiff can prove no set of facts in support of his claim which would entitle him to relief. *Hartford Fire Ins. Co. v. Cal.*, 509 U.S. 764, 810 (1993) (citing *Conley v. Gibson*, 355 U.S. 41, 45-6 (1957)).

² On March 18, 2005, the Court granted a motion by Pourzal for leave to file the Complaint.

III. ANALYSIS

A. Breach of Contract

In Counts V and VI of the Complaint, Pourzal alleges that CHM and BCM breached lease agreements for the Band House and the Chef's House. To state a claim for breach of contract, the plaintiff must allege that: (1) a contract exists; (2) the contract imposes a duty on one party; (3) one party to the contract breached the duty imposed by the contract; and (3) damages resulted from the breach. *See, e.g., Stallworth Timber Co. v. Triad Bldg. Supply*, 968 F. Supp. 279, 282 (D.V.I. App. Div. 1997) (stating elements of breach of contract claim); *see also* Restatement (Second) of Contracts §§ 235, 237, 240 (defining a breach of contract).

Pourzal also alleges that BCM and CHM are the successor owners of the Reef. He alleges that "at some point after March 15, 2000, Marriott . . . sold some but not all of the Hotel's property to the defendants BCM and CHM, and took back a management agreement under which it would manage and operate the [Reef] for BCM and CHM." (Compl. ¶ 41.)

"Ordinarily, . . . absent a contractual obligation to do so, a successor corporation does not assume the liabilities of its predecessor." *Rego v. ARC Water Treatment Co.*, 181 F.3d 396, 401 (3d Cir. 1999). Moreover, a contract is not binding on a

successor in interest unless the obligations therein are assigned to or assumed by the successors. *Cf. Oleksiuk v. Caribbean Watersports & Tours, LLC*, Civil No. 2002-224, 2005 U.S. Dist. LEXIS 14452, at *2 n.3 (D.V.I. July 5, 2005) (noting that a successor in interest is a proper party in a suit against the predecessor where the successor contractually agrees to be bound by the predecessor's contracts).

In Count V, Pourzal alleges that he and Marriott entered into a one-year lease agreement with Marriott for the Chef's House property on August 4, 2000. He also alleges that Marriott breached the Chef's House lease by failing to pay rent during the months of September, October, and November, 2001.

In Count VI, Pourzal alleges that he and Marriott entered into a lease for the Band House property on August 27, 2001. That lease ran from October 1, 2001, until September 30, 2002. Pourzal also alleges that the lease contained a clause that extended the lease for sixty-day periods after the original term expired unless and until one party submitted a notice of termination. Pourzal alleges that Marriott breached this lease by failing to comply with terms in the lease requiring Marriott to repair damage to the property after terminating the lease.

These counts allege conduct by Marriott. However, they do not allege any facts that indicate that either BCM or CHM were

parties to the Band House or Chef's House leases. Nor does the Complaint allege any facts in support of Pourzal's contention that BCM or CHM assumed the liabilities, including the lease agreements, previously incurred by Marriott. Accordingly, even taken as true, Pourzal has not alleged a set of facts that would entitle him to relief against BCM or CHM on Counts V or VI of the Complaint.

B. Misrepresentation Claims

1. Intentional misrepresentation.

In Count VII, Pourzal alleges that BCM and CHM made intentional misrepresentations to him regarding the Band House and Chef's House leases. To state a claim for fraud, or misrepresentation, Pourzal must allege: (1) that BCM and CHM made a representation of a material fact; (2) knowing the representation to be false when it was made; (3) with the intent that Pourzal would act on the statement; and that (4) Pourzal reasonably relied upon the statement; (5) to his detriment. *In re Tutu Water Wells Contamination Litig.*, 32 F. Supp. 2d 800, 805 (D.V.I. 1998) (citing Restatement (Second) of Torts § 530); Restatement (Second) of Torts § 525.

The Federal Rules of Civil Procedure further require that allegations of misrepresentation be pled with specificity. Fed. R. Civ. P. 9(b) ("Rule 9"); *Lum v. Bank of Am.*, 361 F.3d 217, 225

(3d Cir. 2004) (applying Rule 9's requirements to a misrepresentation claim). Rule 9's requirements "may be satisfied if the complaint describes the circumstances of the alleged fraud with 'precise allegations of date, time, or place' or by using some means of 'injecting precision and some measure of substantiation into their allegations of fraud.'" *Bd. of Trs. v. Foodtown, Inc.*, 296 F.3d 164, 172 n.10 (3d Cir. 2002) (citing *Naporano Iron & Metal Co. v. Am. Crane Corp.*, 79 F. Supp. 2d 494, 511 (D.N.J. 1999)); see also *Rolo v. City Inv. Co. Liquidating Trust*, 155 F.3d 644, 658-59 (3d Cir. 1998) (noting that allegations of fraud must state "who misrepresented and concealed the information, when and how"). Allegations of misrepresentation must also describe why or how the representations were false when they were made. See *Charleswell v. Chase Manhattan Bank, N.A.*, 308 F. Supp. 2d 545, 569-70 (D.V.I. 2004) (holding that an allegation of fraud that included a specific date on which a company sent out letters containing information it allegedly knew was false at the time of the mailing was sufficiently specific to satisfy Rule 9(b)).

Pourzal has alleged that BCM and CHM represented that they would enter into a four-year lease for the Chef's House and the Band House properties if Pourzal undertook certain repairs and renovations. Pourzal alleges that the representations were made

by Jane Hillner, an authorized agent of the defendants. He alleges that the defendants intended that Pourzal would rely on these representations. Pourzal further alleges that he relied on the defendants' statements to his detriment, and that the later repudiation of the alleged agreement revealed the fraud.

These allegations do not include dates or any other indication as to when, specifically, the alleged representations occurred. As such, it is questionable whether Count VII satisfies Rule 9's specificity requirement. Even if it does comply with the specificity requirements of Federal Rule of Civil Procedure 9, however, Count VII fails to state a claim for misrepresentation.

Pourzal alleges that CHM and BCM represented that they would enter into long-term lease agreements with Pourzal, and that the later repudiation of these representations makes them into misrepresentations. Subsequently repudiating an agreement, however, does not constitute misrepresentation if one party intended to perform at the time the promise was made. *See, e.g., Seale v. Citizens Sav. & Loan Ass'n*, 806 F.2d 99, 106 (6th Cir. 1986) (noting that a "later repudiation [by a party to an alleged agreement] of an agreement it intended to perform at the time the promise was made would not be actionable" as a fraud or misrepresentation claim). The Complaint contains no facts or

allegations that CHM or BCM did not intend to perform at the time when the agreement was made. Accordingly, Count VII fails to state a claim for intentional misrepresentation.³

2. Negligent misrepresentation.

In Count VIII, Pourzal alleges that BCM and CHM made negligent misrepresentations to him regarding the Band House and Chef's House leases. To state a claim for negligent misrepresentation, Pourzal must allege that: (1) BCM or CHM made a representation that was false; (2) BCM and CHM should have known that the representation was false; (2) Pourzal relied upon the representation; (3) Pourzal suffered pecuniary loss as a result of its justifiable reliance upon the information; and (4) BCM and CHM failed to exercise reasonable care or competence in obtaining or communicating the information contained in the representation. See *In re Tutu Water*, 32 F. Supp. 2d at 807 (citing Restatement (Second) of Torts § 552). The representation must also be false when it is made. *Charleswell*, 308 F. Supp. 2d at 568 (quoting *L.E.B. Enters., Inc. v. Barclays Bank, P.L.C.*, 33 V.I. 42, 46 (Terr. Ct. 1995)).

³ Because Pourzal has failed to sufficiently plead his claim for misrepresentation, CHM and BCM's argument that the misrepresentation and negligent misrepresentation claims are barred by the statute of limitations need not be addressed.

As in Count VII of the Complaint, in Count VIII Pourzal alleges that CHM and BCM represented that they would enter into four-year leases with Pourzal for both the Band House and the Chef's House if Pourzal undertook certain actions. Pourzal further alleges that CHM and BCM knew, or that they should have known, that Pourzal would rely on their statements. Critically, however, Pourzal has not pled that the representations were false when they were made. See *L.E.B. Enters., Inc.*, 33 V.I. at 46 ("[T]he tort of negligent misrepresentation requires an express representation which is false or misleading at the time it is made."). Because Pourzal has failed to state a claim for negligent misrepresentation, Count VIII will be dismissed.

IV. CONCLUSION

For the reasons discussed above, this Court will grant the motion to dismiss Counts V through VIII of the Complaint as to defendants BCM and CHM. An appropriate order follows.

ENTERED this 21st day of August, 2006.

FOR THE COURT:

Curtis V. Gómez
Chief Judge

Pourzal v. Marriott
Civil No. 2001-140
Memorandum Opinion
Page 12

ATTEST:
WILFREDO MORALES
Clerk of the Court

By: _____
Deputy Clerk

Copies to:
Judge Barnard
A. Jeffrey Weiss, Esq.
Marie E. Thomas-Griffith, Esq.
John Zebedee, Esq.
Bennet Chan, Esq.
Maria Tankenson Hodge, Esq.
Lydia B. Trotman
Carol C. Jackson
Olga Schneider
Claudette A. Donovan
Sarah Nelson

NOT FOR PUBLICATION

IN THE DISTRICT COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. THOMAS AND ST. JOHN

NICK POURZAL,)	
)	
Plaintiff,)	
)	
v.)	Civ. No. 2001-140
)	
MARRIOTT INTERNATIONAL, INC.,)	
CAPITAL HOTEL MANAGEMENT, LLC and)	
BLACKACRE CAPITAL MANAGEMENT, LLC,)	
)	
Defendants.)	
_____)	

MARRIOTT INTERNATIONAL, INC.,)
)
Defendant/)
Third-Party Plaintiff,)
)
v.)
)
PRIME HOSPITALITY CORP.,)
)
Third-Party Defendant.)
_____)

ATTORNEYS:

A. Jeffrey Weiss, Esq.
For the plaintiff, Nick Pourzal

Marie E. Thomas-Griffith, Esq.
For the defendant and third-party plaintiff Marriott International, Inc.

John Zebedee, Esq.
For the defendant Blackacre Capital Management

Bennet Chan, Esq.
For the defendant Capital Hotel Management, LLC

Maria Tankenson Hodge, Esq.

For the third-party defendant Prime Hospitality Corp.

ORDER

GÓMEZ, Chief J.

AND NOW, for the reasons more fully stated in the Memorandum of even date, it is hereby

ORDERED that the motion of Blackacre Capital Management and Capital Hotel Management, LLC, to dismiss Counts V, VI, VII and VIII of the Revised Third Amended Complaint is **GRANTED**.

ENTERED this 21st day of August, 2006.

FOR THE COURT:

Curtis V. Gómez
Chief Judge

ATTEST:
WILFREDO MORALES
Clerk of the Court

By: _____
Deputy Clerk

Copies to:
Judge Barnard
A. Jeffrey Weiss, Esq.
Marie E. Thomas-Griffith, Esq.
John Zebedee, Esq.
Bennet Chan, Esq.
Maria Tankenson Hodge, Esq.
Lydia B. Trotman
Carol C. Jackson
Olga Schneider
Claudette A. Donovan
Sarah Nelson